Supreme Court, U.S.
FILED

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No. 97 737 OCT 24 1997

In The
Supreme Court of the United States

October Term 1997

ALEXANDER S., *et al.*,
Petitioners,

v.

FLORA BROOKS BOYD, *et al.*,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petition for Writ of Certiorari

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QUESTION PRESENTED

Do the restrictions on attorneys' fees in § 803(d) of the Prison Litigation Reform Act of 1995 apply to an application for fees filed on behalf of incarcerated juveniles when the case was pending, and prevailing party status established, prior to the effective date of the Act?

LIST OF PARTIES

The parties to the proceedings below were the petitioners Robert H. Burnside, Special Master; Alfred S., Benny B., Christopher M., Lafayette M., and Ricky S. by and through their Guardian ad Litem Lesly A. Bowers; and Inez Moore Tenenbaum, individually and as a representative of a class of juveniles.

The respondents before this Court are Richard E. McLawhorn, individually and in his official capacity as former Commissioner of the Department of Juvenile Justice for the State of South Carolina; John F. Henry; Frank Maudlin; Kathleen P. Jennings; Joseph W. Hudgens; Karole Jensen; and J.P. Neal, individually and in their official capacities as former Board Members for the South Carolina Department of Juvenile Justice; and the South Carolina Department of Youth Services.

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PETITION FOR WRIT OF CERTIORARI

Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit in the case of *Alexander S. ex rel. Bowers v. Boyd* (4th Circuit No. 96-1950) is published at 113 F.3d 1373 and is reprinted in the appendix, p.1 *infra*. The Order denying Petitioner's Petition for Rehearing with Suggestion for Rehearing En Banc is also reprinted in the appendix, p.84 *infra*. The opinions of the United States District Court for the District of South Carolina at Columbia in the case of *Alexander S. ex rel. Bowers v. Boyd* (3:90-3062-17) were issued on February 16, 1996; May 29, 1996; and August 30, 1996 and are unreported. They are reprinted in the appendix, pp.48, 63, 71 *infra*.

JURISDICTION

The decision of the panel of the Fourth Circuit Court of Appeals was entered on May 28, 1997. Petitioners filed a timely petition for rehearing and suggestion for rehearing *en banc* on June 3, 1997. The court of appeals denied rehearing and rehearing *en banc* on July 29, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1994).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 1997(1) (1994):

§ 1997. Definitions

As used in this subchapter —

> (1) The term "institution" means any facility or institution —

(A) which is owned, operated, or managed by, or provides services on behalf of any State or political subdivision of a State; and

(B) which is —

(i) for persons who are mentally ill, disabled, or retarded, or chronically ill or handicapped;

(ii) a jail, prison, or other correctional facility;

(iii) a pretrial detention facility;

(iv) for juveniles —

(I) held awaiting trial;

(II) residing in such facility or institution for purposes of receiving care or treatment; or

(III) residing for any State purpose in such facility or institution (other than a residential facility providing only elementary or secondaryeducation that is not an institution in which reside juveniles who are adjudicated delinquent, in need of supervision, neglected, placed in State custody, mentally ill or disabled, mentally retarded, or chronically ill or handicapped); or

(v) providing skilled nursing, I intermediate or long-term care, or custodial or residential care.

42 U.S.C.A. § 1997e(d) (West Supp. 1997):

(d) Attorney's fees

(1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 1988 of this title, such fees shall not be awarded, except to the extent that —

(A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute pursuant to which a fee may be awarded under section 1988 of this title;

(B)(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or

(ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.

(2) Whenever a monetary judgment is awarded in an action described in paragraph (1), a portion of the judgment (not to exceed 25 percent) shall be applied to satisfy the amount of attorney's fees awarded against the defendant. If the award of

attorney's fees is not greater than 150 percent of the judgment, the excess shall be paid by the defendant.

(3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of Title 18, for payment of court-appointed counsel.

(4) Nothing in this subsection shall prohibit a prisoner from entering into an agreement to pay an attorney's fee in an amount greater than the amount authorized under this subsection, if the fee is paid by the individual rather than by the defendant pursuant to section 1988 of this title.

STATEMENT OF THE CASE

A. The Proceedings in the District Court

This case was filed in 1990 in the District of South Carolina on behalf of a class of incarcerated juveniles. The complaint alleged violations of 42 U.S.C.A. § 1983 (West Supp. 1997) regarding the conditions of confinement of juveniles held in facilities operated by the South Carolina Department of Juvenile

Justice.[1] The district court had jurisdiction pursuant to 28 U.S.C. § 1343(a)(3) (1994).

Following trial, the district court found a violation of the due process rights of the petitioners. *Alexander S. ex rel. Bowers v. Boyd*, 876 F. Supp. 773, 786-95 (D.S.C. 1995). The district court subsequently approved, and then modified, the remedial plan submitted by the respondents. On February 16, 1996, the district court found that the petitioners were the prevailing parties in the litigation for the purpose of the award of attorneys' fees pursuant to 42 U.S.C.A. § 1988 (West 1994 & Supp. 1997). Because the district court expected that petitioners' counsel would monitor compliance with the remedial plan, the court established a system for the submission of future petitions for attorneys' fees.

On April 26, 1996, the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321 (1996) (hereinafter PLRA) became effective. Section 803(d) of that Act, codified at 42 U.S.C.A. § 1997e(d) (West Supp. 1997), provides several restrictions on the award of attorneys' fees awarded pursuant to 42 U.S.C.A. § 1988, as follows:

> (d) Attorney's fees
>
> (1) In any action brought by a prisoner who is confined to any jail, prison, or other correctional facility, in which attorney's fees are authorized under section 1988 of this title, such fees shall not be awarded, except to the extent that —
>
> (A) the fee was directly and reasonably incurred in proving an actual violation of the plaintiff's rights protected by a statute

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[1] The complaint also alleged violations of the Individuals with Disabilities Education Act, 20 U.S.C.A. §§ 1400-1485 (West 1990 & Supp. 1997); the Rehabilitation Act of 1973, 29 U.S.C.A. §§ 701-796 (West 1985 & Supp. 1997); and the Americans with Disabilities Act, 42 U.S.C.A. §§ 12101-12213 (West 1995 & Supp. 1997).

> pursuant to which a fee may be awarded under section 1988 of this title; and
>
> (B)(i) the amount of the fee is proportionately related to the court ordered relief for the violation; or
>
> (ii) the fee was directly and reasonably incurred in enforcing the relief ordered for the violation.
>
> * * *
>
> (3) No award of attorney's fees in an action described in paragraph (1) shall be based on an hourly rate greater than 150 percent of the hourly rate established under section 3006A of Title 18, for payment of court-appointed counsel.

On May 29, 1996, the district court awarded petitioners attorneys' fees for services performed by counsel from May 1995 through February 1996. The court noted the enactment of the PLRA, and that there was a dispute as to whether the statute applied to lawsuits involving juvenile facilities. The court found it unnecessary to resolve that dispute "[b]ecause the fees presently at issue were all incurred before the date of this legislation[.]" Order Awarding Attorneys' Fees, May 29, 1996, App. at 65. The court awarded approximately $189,000 in fees and costs to petitioners' counsel, at rates ranging up to $225.00 per hour for the work of lead counsel. *Id.* at 68-70. On August 30, 1996, the district court addressed petitioners' request for attorneys' fees for the period of February through June, 1996. With respect to those fees related to services performed after the effective date of the PLRA, the court decided that the restrictions did not apply because the juvenile facilities at issue in the case were not

"prisons" as the term is used in the relevant PLRA provision. The court noted that the PLRA fees amendment is codified as 42 U.S.C.A. § 1997e(d). The definitions in 42 U.S.C. § 1997 applicable to that section distinguish between a "jail, prison, or other correctional facility" and juvenile facilities. While Congress had specifically defined the term "prison" to include juvenile facilities in other sections of PLRA codified in Title 18 of the United States Code, it had not changed the distinction between juvenile facilities and prisons in § 1997 when PLRA was enacted. Accordingly, the court decided that the fees restrictions, applicable "in any action brought by a prisoner who is confined to any jail, prison, or correctional facility" were inapplicable to cases involving juvenile facilities. Order, Aug. 30, 1996, App. at 71.

B. The Proceedings in the Court of Appeals

The respondents appealed to the Fourth Circuit. A divided panel of the Fourth Circuit reversed and remanded to the district court with directions to apply the PLRA restrictions to the fee applications for work both before and after the effective date of the Act. *Alexander S. ex rel. Bowers v. Boyd*, 113 F.3d 1373, 1392 (4th Cir. 1997).

The two judges in the majority of the panel offered somewhat differing rationales for the application of the Act to work performed before the effective date of the Act. The Honorable Karen J. Williams first decided that the plain language of the fees section required that it apply to all fees awarded for work performed subsequent to the effective date of the Act. *Id.* at 1385-86. Judge Williams then determined that, under *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994), application of the statute to work performed prior to the effective date of the Act would not have an impermissible retroactive effect "because the determination of attorney's fees awards, which are collateral to the main cause of action, does not attach new legal consequences to completed events." *Alexander S.*, 113 F.3d at 1388. The Honorable Diana Gribbon Motz concurred on the ground that the plain language of the statute required its application at the time the court considered the award of fees; accordingly the case did not require an analysis under *Landgraf* to determine whether such

application would have a "retroactive effect." *Id.* at 1392-93 (Motz, J., concurring). The Honorable Francis D. Murnaghan, Jr., dissented from the conclusion that the PLRA fees amendments expressly directed application to work performed prior to the effective date of the Act and from the conclusion that such application would not have a retroactive effect. *Id.* at 1394-95 (Murnaghan, J., dissenting). Indeed, he concluded that there was evidence that Congress did not intend for the statute to apply to work before the effective date of the statute. In any event, he concluded that it should not be applied retroactively in this case, since such application would be "manifestly unjust," and therefore improper under *Bradley v. School Bd.*, 416 U.S. 696, 711 (1974). *Alexander S.*, 113 F.3d at 1395 (Murnaghan, J., dissenting).

The panel also rejected the holding of the district court that the PLRA fees amendments did not apply to cases involving juvenile detention facilities. The court reasoned that the ordinary meaning of the phrase "jail, prison, or other correctional facility" in the PLRA fees amendments encompassed a juvenile detention facility. While the court acknowledged the definition in 42 U.S.C. § 1997 distinguishing between juvenile facilities and prisons, the court concluded that excluding cases involving juvenile detention facilities from the scope of the PLRA fees provisions would be inconsistent with the definition of the term "prisoner" in the fees amendments because that definition includes juveniles. It would also be inconsistent with the definition of the term "prison" in other sections of PLRA codified in Title 18 to include juvenile facilities.

The decision of the panel was entered on May 28, 1997. The petitioners requested rehearing, and suggested rehearing *en banc*, on June 3, 1997. The Fourth Circuit Court of Appeals rejected the request on July 29, 1997, with two judges dissenting and one not voting.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW CREATES A CONFLICT AMONG THE CIRCUITS

A. Every Court Other Than the Court Below Has Rejected the Application of the PLRA Fees Provisions to Fees Earned Prior to the Effective Date of the Act

Every court to decide the issue, other than the court below, has held that the limitations on the award of attorneys' fees in Section 803(d) of the Prison Litigation Reform Act of 1995, codified at 42 U.S.C.A. § 1997e(d) (West Supp. 1997), do not apply to requests for fees that were earned prior to April 26, 1996, the date that PLRA became effective.

The courts reaching this conclusion include the Courts of Appeals of the Seventh and Eighth Circuits. *See Weaver v. Clarke*, 120 F.3d 852 (8th Cir. 1997), *petition for cert. filed* (US. Oct. 8, 1997) (No. 97-627); *Cooper v. Casey*, 97 F.3d 914 (7th Cir. 1996); *Jensen v. Clarke*, 94 F.3d 1191 (8th Cir. 1996).[2] All

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[2] As noted in the Statement of the Case, this case involves work earned both before and after the effective date of the Act. The reasoning of *Jensen v. Clarke* does not distinguish between these two situations:

> The Act was not in effect when the plaintiffs' attorneys accepted this appointment, when liability and fee determinations were made, or even when we remanded this case to the District Court in light of *Farmer [v. Brennan*, 511 U.S. 825 (1994)]. When the plaintiffs' attorneys were exerting what the District Court quite fairly described as "herculean" efforts on their behalf, they expected to have their fee determined under Section 1988. If we apply the Act, those expectations will be foiled. Thus, application of the Act in this case would have the retroactive effect of disappointing reasonable reliance on prior law.
>
> * * *

the federal district courts to decide the issue have also refused to apply the PLRA fees restrictions to fees that were earned prior to the effective date of the Act. *See Blissett v. Casey*, 969 F. Supp. 118 (N.D.N.Y. 1997) (refusing to apply restrictions to attorneys' fees earned after PLRA went into effect when case was pending on effective date); *Hadix v. Johnson*, 965 F. Supp. 996 (W.D. Mich. 1997) (same); *Miller-Bey v. Stiller*, No. 93-CV 72111, 1997 U.S. Dist. LEXIS 8524 (E.D. Mich. Feb. 25, 1997) (adopting Magistrate Judge's recommendation that PLRA fee restrictions not be applied to work performed before passage of Act); *Hadix v. Johnson*, 947 F. Supp. 1113, 1114 n.1 (E.D. Mich. 1996) (applying PLRA fee provisions to work earned after effective date of Act but not to work earned prior to that date).[3]

B. This Decision Directly Conflicts with Decisions of the Seventh and Eighth Circuits

The Fourth Circuit stated in the decision below that its holding does not conflict with the decisions of the Seventh Circuit

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> [I]n this case the plaintiffs and their attorneys have proceeded from the outset under the assumption that Section 1988 would apply to this case. They have litigated for literally years under that assumption. The Act was passed after our remand to the District Court, and after the District Court's findings on remand. Indeed, it did not become law until shortly before we were prepared to decide this case once and for all. It would be "manifestly unjust" to upset those reasonable expectations and impose new guidelines at this late date.

94 F.3d. at 1202-03.

[3] There are also a number of unreported district court opinions refusing to apply the PLRA fees restrictions in cases that were pending when the Act became effective. *See Madrid v. Gomez*, No. C 90-3094 (N.D. Cal. June 13, 1997); *Tragale v. Scheel*, No. CV-N-93-672-DWH (D. Nev. May 21, 1997); *Browning v. Vernon*, No. Civ. 91-0409-S-BLW (D. Idaho March 7, 1997); *Coleman v. Wilson*, No. CIV 5-90-0520 LKK JFM (E.D. Cal. Jan. 21, 1997); *Perrier v. City of Albuquerque*, No. Civ. 95-943 RLP/WWD (D.N.M. Dec. 17, 1996).

in *Cooper v. Casey*, 97 F.3d 914 (7th Cir. 1996), or the Eighth Circuit in *Jensen v. Clarke*, 94 F.3d 1191 (8th Cir. 1996), because, in both those cases, the district court had actually awarded the contested fees prior to the effective date of PLRA. *See Alexander S.*, 113 F.3d at 1386 n.11. However, the Fourth Circuit's application of PLRA to fees earned before the effective date of the Act squarely conflicts with decisions of those Circuits. Whether or not *Alexander S.* creates a direct conflict with *Jensen* has become irrelevant. The Eighth Circuit followed *Jensen* in *Weaver v. Clarke*, 120 F.3d 852 (8th Cir. 1997), *petition for cert. filed* (U.S. Oct. 8, 1997) (No. 97-627). In *Weaver*, as in the case below, the district court awarded the fees at issue after the effective date of the Act. *Weaver v. Clarke*, 933 F. Supp. 831 (D. Neb. 1996). Accordingly, there is no way to harmonize the positions of the two circuits.

Petitioners submit that the decision below also conflicts with *Cooper v. Casey*. The Seventh Circuit stated the following in that case:

> [W]e agree with the Eighth Circuit that this provision of the Act does not have retroactive effect. *Jensen v. Clarke*, 94 F.3d 1191, 1201-03 (8th Cir. 1996). To give it such effect would attach (without clear indication of congressional intent to do so) new legal consequences to completed conduct, namely the services rendered by the plaintiffs' counsel in advance of the passage of the new Act.

97 F.3d at 921 (citations omitted).

Because the Seventh Circuit vacated the attorneys' fees award on appeal for other reasons, the opinion rejecting the application of the PLRA to fees earned prior to the effective date of the Act and remanding to the district court acts as a directive to that court regarding the award of fees on remand. Because of this directive on remand, neither the reasoning nor the holding in *Cooper* can be harmonized with *Alexander S.* Accordingly, the decision below is

in direct conflict with decisions of both the Seventh and Eighth Circuits.

II. THE DECISION BELOW IS INCONSISTENT IN PRINCIPLE WITH DECISIONS OF THIS COURT

The decision of the court below to apply the PLRA fees amendment is inconsistent with the Court's reasoning in *Lindh v. Murphy*, 117 S. Ct. 2059 (1997). The decision also misapplies *Landgraf v. USI Film Prods.*, 511 U.S. 244 (1994) and *Bradley v. School Bd.*, 416 U.S. 696 (1974).

A. The Court Below Erred in Finding a Clear Intent that the Fees Provision Apply to Pending Cases

In the decision below, the majority of the panel concluded that the plain language § 803(d) of the PLRA, codified at 42 U.S.C.A. § 1997e(d) (West Supp. 1997) evinced Congress' intent that the fees limitation apply to pending cases. The majority based this conclusion on the language of § 803(d) providing that "fees shall not be awarded, except to the extent [specified in the section]," which the majority read as a directive to apply the amendment any time that a court makes an award of fees.

The argument that § 803(d) contains a clear statement of intent that it apply to pending cases is circular. Only if the section is assumed *a priori* to apply to pending cases does the language "such fees shall not be awarded, except to the extent that . . ." convey any such intention. Without such an assumption, the phrase simply does not speak to whether the section applies to pending cases.

Moreover, the conclusion of the Fourth Circuit is flatly inconsistent with the reasoning of both the majority and the dissent in *Lindh v. Murphy*, 117 S. Ct. 2059 (1997). In *Lindh* the Court was asked to decide whether a certain provision of the Antiterrorism and Effective Death Penalty Act of 1996 (hereinafter AEDPA) is applicable to cases pending when the Act was passed. The AEDPA consists of two chapters, one of which governs capital cases and explicitly provides that it "'shall apply to cases pending on or after the date of enactment of this Act.'"

Id. at 2063 (citation omitted). The other chapter — the one at issue in *Lindh* — governs noncapital cases and does not contain a comparable provision. *Id.* at 2063-65. Rather, the section of the AEDPA at issue in *Lindh* provides that "[a]n application for a writ of habeas corpus . . . shall not be granted" except as provided. 28 U.S.C.A. § 2254(d) (West Supp. 1997). If the reasoning of the court below were correct, this language would require application of the new AEDPA statute in every case in which a federal court was asked to issue a writ of habeas corpus.

The Court's treatment of the retroactivity issue in *Lindh*, however, is flatly inconsistent with such reasoning. Of particular note, the majority in *Lindh* emphasized the need for a clear statement of Congressional intent to overcome the general presumption against applying non-procedural statutes to pending cases, including statutes that "might not have a true retroactive effect." 117 S. Ct. at 2063-64. *Lindh* also demonstrates the rigor with which this Court has enforced the clear statement rules. For example, the majority opinion questioned whether language in the AEDPA providing that Chapter 154 (which was not at issue in *Lindh*) "shall apply to cases pending on or after the date of the enactment of this Act" was sufficient to qualify as a clear statement. *Id.* at 2063-64 n.4.

Futhermore the reasoning of the dissent in *Lindh* is equally inconsistent with the reasoning of the Fourth Circuit in this case:

> The first question we must ask is whether Congress has expressly resolved whether the provision in question applies to pending cases. *Landgraf v. USI Film Products*, 511 U.S. 244, 280, 114 S. Ct. 1483, 1505, 128 L.Ed. 2d 229 (1994). Here, the answer is plainly no. The AEDPA does not clearly state, one way or the other, whether Chapter 153 applies to pending cases.

Id. at 2068 (Rehnquist, C.J., dissenting).

B. The Court Below Erred in Failing to Draw an Inference from the Explicit Provision for Retroactivity in § 802

Lindh renders untenable another aspect of the reasoning of the court below. Judge Williams' opinion notes that Congress expressly provided for retroactive application in § 802 of PLRA, but § 803 contains no stated effective date. Her opinion "decline[s] to draw any negative inferences from the express inclusion of a provision making § 802 applicable to pending cases and the absence of the same from § 803." *Alexander S.*, 113 F.3d at 1387.

In contrast, the Court in *Lindh* treated a comparable distinction between sections of the statute as the decisive factor. In refusing to apply amended § 2254 to cases pending at the time of enactment of the AEDPA, the Court held that the difference between the two sections indicated Congress' intent that the latter provision should be applied only to cases filed after the date of the Act. 117 S. Ct. at 2063. The Court found this "negative implication [ ]" to be particularly pronounced because "the [two chapters] had already been joined together [in a single bill] and were being considered simultaneously when the language raising the implication was inserted," although they began life independently and in different Houses of Congress. *Id.* at 2065. The Court distinguished this legislative history from one in which "two chapters had evolved separately in the congressional process, only to be passed together at the last minute." *Id.* at 2064.

In this regard, the AEDPA is indistinguishable from the PLRA. The attorneys' fees provisions of the PLRA, amending 42 U.S.C. § 1997e, are found in § 803 of the Act. This section is silent as to whether it should be applied retroactively to pending cases or only prospectively to cases filed after the Act's passage. In stark contrast, § 802 of the Act, which addresses "appropriate remedies" in prison conditions litigation, explicitly states that the section is to be applied to pending cases, as follows:

> Section 3626 of title 18, United States Code, as amended by this section, shall apply with respect

> to all prospective relief *whether such relief was originally granted or approved before, on, or after the date of the enactment of this title.*

Pub. L. No. 104-134, § 802(b)(1), 110 Stat. 1321, 1321-70 (1996) (emphasis added).[4]

Furthermore, as in *Lindh*, the negative inference created by the different treatment of the two sections is particularly strong because the PLRA's legislative history shows that sections 802 and 803 "had already been joined together and were being considered simultaneously when the language raising the implication was inserted." *Lindh*, 117 S. Ct. at 2065. The precursor to the PLRA was the "Stop Turning Out Prisoners Act," known by the acronym "STOP," which was introduced as Title III of H.R. 667 in the House of Representatives and S. 400 in the Senate. In this version of the bill, the injunctive relief provisions and the attorneys' fees provisions of the PLRA appeared together in a single section that was subject to an explicit statement of its applicability to all cases then pending. *See* H.R. 667, 104th Cong., 1st Sess. § 301(b) (1995). Thereafter, S. 400 was added by the Senate Appropriations Committee as Title VIII of the Commerce, State & Justice Appropriations bill (hereinafter "CS&J bill"). During Senate floor debate on the CS&J bill, on September 29, 1995, STOP was replaced by a "Dole-Hatch substitute" bearing the name of the statute that ultimately became law. The vast majority of S. 400's provisions, including the retroactivity provision, appeared in section 802 of the substitute bill. However, the attorneys' fees provision had been extracted from this section and transferred to a new section of the bill, section 803, which did not contain a retroactivity provision. The statute retained this structure until its final passage.[5]

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[4] Section 802 and § 803 modify different titles and sections of the United States Code. Section 802 was codified at 18 U.S.C.A. § 3626 (West Supp. 1997) and § 803 was codified at 42 U.S.C.A. § 1997e(d) (West Supp. 1997).

[5] Only two changes were made to the Dole-Hatch substitute bill before its final passage. First, the numerical cap on the hourly rate that could be awarded as attorneys' fees was increased. *See* 42 U.S.C.A. § 1997e(d)(2) (West Supp. 1997). Second, a provision authorizing an

Given the inclusion of an explicit statement that § 802 apply to pending cases, and the absence of a similar provision in § 803, the reasoning in *Lindh* dictates the conclusion that Congress intended that the attorneys' fees provisions — and the other provisions found in § 803 — apply only to cases filed after the enactment of the PLRA. Accordingly, PLRA and the AEDPA are precisely parallel in structure and legislative history; in light of *Lindh*, which was decided after the decision below, the Fourth Circuit committed clear error.[6]

C. The Court Below Erred in Assuming that New Statutes Ordinarily Apply to Pending Cases

In *Alexander S.*, the opinion of Judge Williams states that "[a]bsent an express directive from Congress, we *must* apply a newly enacted statute to pending cases unless doing so would give

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award of attorneys' fees for enforcement work was added to the bill. *See* 42 U.S.C.A. § 1997e(d)(1)(B)(ii) (West Supp. 1997). These changes were made in early December 1995 by the members of the CS&J Conference Committee.

[6] In contrast, the Eighth Circuit in *Jensen v. Clark*, 94 F.3d 1191 (8th Cir. 1996), correctly anticipated *Lindh*:

> [T]here is evidence of congressional intent contrary to retroactive application of [the attorneys' fees] portion of the Act. Section 802, the section of the Act dealing with prospective relief, specifically provides that it "shall apply with respect to all prospective relief whether such relief was originally granted or approved before, on, or after the date of enactment of this title." § 802(b)(1). Section 803, conversely, is silent on retroactive application. Congress saw fit to tell us which part of the Act was to be retroactively applied, Section 802. The exclusion of Section 803 and its fee provisions from that clear statement is inconsistent with the defendants' argument for retroactivity.

Id. at 1203.

the statute 'retroactive effect.'" 113 F.3d at 1387 (emphasis added). Judge Williams' opinion cites *Landgraf*, 511 U.S. at 277, for this proposition. The cited language in *Landgraf* is a description of the holding in *Bradley v. School Bd.*, 416 U.S. 696 (1969). In fact, the entire thrust of *Landgraf* was reconciling two lines of cases: one line stressing the presumption against retroactive application of statutes, and the other line, most prominently represented by *Bradley*, supporting the general applicability of new statutes to pending cases. The Court in *Landgraf* reconciled the cases by rejecting the reading of *Bradley* that Judge Williams gives it. *Landgraf* rejected a "categorical presumption" in favor of the application of all new statutes to pending cases, 511 U.S. at 277, and it construed *Bradley* not "to displace the traditional presumption against applying statutes affecting substantive rights, liabilities, or duties to conduct arising before their enactment." *Id.* at 278.[7]

In *Lindh*, the Court even more explicitly repudiated the argument that statutes must apply to pending cases absent retroactive effect or an express directive from Congress:

> Although *Landgraf*'s default rule would deny application when a retroactive effect would otherwise result, other construction rules may

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[7] The error of the court below is comparable to the error corrected in *Hughes Aircraft Co. v. United States ex rel. Shumer*, 117 S. Ct. 1871 (1997):

> The Ninth Circuit simply misread our decision in *Landgraf*, for the only "presumption" mentioned in that opinion is a general presumption *against* retroactivity. The fact that courts often apply newly enacted jurisdiction-allocating statutes to pending cases merely evidences certain limited circumstances failing to meet the conditions for our generally applicable presumption against retroactivity, not an exception to the rule itself.

Id. at 1878. Similarly, the court below erred in relying on a nonexistent rule requiring the application of statutes to pending cases.

> apply to remove even the possibility of retroactivity (as by rendering the statutory provision wholly inapplicable to a particular case), as Lindh argues the recognition of a negative implication would do here. In sum, if the application of a term would be retroactive as to Lindh, the term will not be applied, even if, in the absence of retroactive effect, we might find the term applicable; *if it would be prospective, the particular degree of prospectivity intended in the Act will be identified in the normal course in order to determine whether the term does apply to Lindh.*

117 S. Ct. at 2063 (emphasis added).[8]

D. Application of the PLRA Fees Amendments in Cases that Were Pending on the Effective Date of the Act Would Be Manifestly Unjust

In *Bradley v. School Bd.*, 416 U.S. 696 (1974), the Court stated that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." *Id.* at 711. Although *Lindh* has clarified that the reach of this principle is limited, even under the Court's formulation in *Bradley*, the fees provision at issue in this case should not be applied to pending cases because to do so is "manifestly unjust."

This case was reduced to judgment, and plaintiffs established their status as prevailing parties, before the passage of the PLRA. Counsel in the case are not paid on an hourly rate by the clients. Rather, they function as "private attorneys general" who receive compensation under the civil rights fee statute, 42

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[8] Similarly, the Court's decision in *Lindh* indicates that characterization of a statute as involving "secondary" rather than "primary" conduct is not talismanic with respect to retroactivity analysis. *Compare Alexander S.*, 113 F.2d at 1387 *with Lindh*, 117 S. Ct. at 2070 (Rehnquist, C.J., dissenting).

U.S.C.A. § 1988 (West 1994 & Supp. 1997). In this case, as in other cases initiated before the PLRA's passage, counsel undertook the litigation with a settled expectation that, if they prevailed, they would be compensated under § 1988 for all the hours that were reasonably spent litigating the case at the prevailing rate for attorneys with similar experience and skill.

Indeed, the very purpose of § 1988 was to create an expectation on the part of plaintiffs' counsel of an award of reasonable attorney fees in meritorious civil rights cases. The Senate and House reports that accompanied the passage of § 1988 stated that the purpose of the legislation was to ensure "effective access to the judicial process" for victims of civil rights abuse. H.R. Rep. No. 1558, 94th Cong., 2d Sess. 1 (1976). "[F]ee shifting provisions have been successful in enabling vigorous enforcement of modern civil rights legislation." S. Rep. No. 1011, 94th Cong., 2d Sess. 3-4 (1976). To effectuate these principles, Congress expressed its intent that a prevailing plaintiff "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Id.* at 4 (citation and internal quotation marks omitted). Any lesser standard, under which an award of fees is speculative, would defeat the purposes of the Act.[9] In this case, petitioners' expectation was reinforced by the order of the district court of February 16, 1996, making a finding that petitioners were the prevailing party and setting up a system for determining the amount of fees to be awarded to petitioners as a result of their counsels' work in monitoring compliance with the court's orders.

If the attorneys' fee provisions of the PLRA are applied to this case, petitioners would not be compensated under § 1988 at market rates for all hours reasonably spent in successfully litigating the case; instead, petitioners' counsels' fees would be

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[9] Representative Seiberling, who introduced the Act in the House of Representatives, explained that his bill "called for the mandatory award of attorneys' fees to prevailing plaintiffs because I felt that the award should be automatic except in the most extraordinary circumstances." 122 Cong. Rec. H12,165 (daily ed. Oct. 1, 1976), *quoted in Wharton v. Knefel*, 562 F.2d 550, 558 n.36 (8th Cir. 1977).

capped at $112.50 per hour[10] and the PLRA restrictions on compensable activities could mean that no fees would be awarded.[11] This amounts to a significant reduction because the district court awarded hourly rates of up to $225.00. This reduction attaches new legal consequences to events completed before the PLRA's enactment — the initiation of litigation, the assumption of representation and the establishment of prevailing party status — and it takes away rights acquired under previously existing laws. Furthermore, in cases filed before the PLRA's passage, petitioners' counsel cannot be said to have "fair notice" that their fees would be radically cut during the course of the litigation.

Moreover, petitioners' counsel cannot withdraw from the litigation merely because application of the PLRA rates requires him to work for about one-half of his usual rate. In juvenile conditions cases, like prison conditions cases, a "consent decree [is] only the beginning, and counsel for the plaintiffs has a continuing duty and responsibility to make sure that the defendants comply, and continue to comply, with the decree." *Duran v. Carruthers*, 885 F.2d 1492, 1495 (10th Cir. 1989). In most cases, ethical obligations would prevent plaintiffs' counsel from withdrawing from the case in light of the PLRA's enactment:

> An attorney who has entered an appearance in a case may not withdraw without leave of court because the court's interest in making sure that a litigant is adequately represented and that the orderly prosecution of the lawsuit is not disrupted is paramount to a lawyer's personal interest in terminating a relationship with a client.

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[10] *See Alexander S.*, 113 F.3d at 1377 n.1.

[11] *See id.* at 1391-92 (remanding for a determination of whether any fees were appropriate in light of the restrictions on compensable activities required by PLRA).

Mallard v. United States Dist. Court for the S. Dist. of Iowa, 490 U.S. 296, 316 (1989) (Stevens, J., dissenting) (citing *Ohntrup v. Firearms Ctr., Inc.*, 802 F.2d 676 (3d Cir. 1986), and *Mekdeci ex rel. Mekdeci v. Merrell Nat'l Labs., Inc.*, 711 F.2d 1510, 1521-22 (11th Cir. 1983)).

Under these circumstances, the Eighth Circuit in *Jensen* correctly determined that it would be "manifestly unjust" to upset the reasonable expectations of plaintiffs and their counsel that § 1988 would apply to this case. *See supra* pp.10-11 n.2. Because application of the fees amendment would be "manifestly unjust," *Bradley* does not support the decision below.[12]

III. THE COURT BELOW ALSO ERRED BY APPLYING THE STATUTE TO A CASE INVOLVING JUVENILE FACILITIES

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[12] In *Bradley*, the district court had awarded attorneys' fees and costs, upon general equitable principles, to parents who had prevailed in an action seeking to desegregate Richmond's public schools. While the case was pending before the Fourth Circuit Court of Appeals, Congress enacted § 718 of the Education Amendments of 1972, which authorized federal courts to award the prevailing parties in school desegregation cases reasonable attorney fees, but did not specify whether it was applicable to pending cases. The court of appeals held that the new fees provision did not authorize the award of fees for services rendered before the effective date. This Court reversed because "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." 416 U.S. at 711.

Notwithstanding that, as in *Bradley*, the issue here pertains to attorneys' fees, critical factors distinguish the analysis of the "manifest injustice" exception. The equities involved in applying a fees statute that *authorizes* a fees award to cases filed before passage of the statute are entirely distinct from those involved in application of a statute that *deprives* a court of such authorization. In the latter but not the former circumstance, the application of an amendment fails to protect plaintiffs' counsel's reasonable reliance on the prior version of the statute in deciding to undertake the litigation. Accordingly, although application of a new fees statute was not unfair in *Bradley*, it is "manifestly unjust" here.

The court below applied 42 U.S.C. § 1997e(d) (West Supp. 1997) to the petitioners, who are juveniles confined in facilities operated exclusively for juveniles. In so doing, the court below erred in four ways. The court ignored the fact that Congress in PLRA defined the scope of the Act's coverage differently in the § 1997 amendments from the scope of the PLRA amendments codified elsewhere; the court failed to apply the definitions Congress specified were to apply to § 1997e(d); the court construed the section in a manner that renders some of its language meaningless; and the court ignored the inference created by PLRA's legislative history.

A. Section 1997 Distinguishes Between Juvenile and Correctional Facilities

As amended by PLRA, 42 U.S.C.A. § 1997e(h) (West Supp. 1997) defines the term "prisoner," as used in § 1997e, to include juveniles. A "prisoner" is "any person incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms or conditions of parole, probation, pretrial release, or diversionary program." Accordingly, if Congress had simply provided in § 1997e(d) that the new fees provision applied "in any action brought by a prisoner," then cases involving juveniles adjudicated as delinquents brought after the effective date of the Act would be within the scope of the Act's coverage.

Significantly, however, this is not how Congress worded the fees provision in § 1997e(d). Rather, Congress added a restrictive clause specifying that the section applies "[i]n any action brought by a prisoner *who is confined to any jail, prison, or other correctional facility.*" (Emphasis added). The phrase "confined to any jail, prison, or other correctional facility" echoes a distinction made in the definitional section, § 1997(1)(B)(ii):

§ 1997. Definitions

As used in this subchapter

(1) The term "institution" means any facility or institution —

(A) which is owned, operated, or managed by, or provides services on behalf of any State or political subdivision of a State; and

(B) which is —

(i) for persons who are mentally ill, disabled, or retarded, or chronically ill or handicapped;

(ii) *a jail, prison, or other correctional facility*;

(iii) a pretrial detention facility;

(iv) *for juveniles* —

(I) held awaiting trial;

(II) residing in such facility or institution for purposes of receiving care or treatment; or

(III) residing for any State purpose in such facility or institution (other than a residential facility providing only elementary or secondary education that is not an institution in which reside juveniles who are adjudicated delinquent, in need of supervision, neglected, placed in State custody, mentally ill or disabled, mentally retarded, or chronically ill or handicapped); or

> (v) providing skilled nursing, intermediate or long-term care, or custodial or residential care.

42 U.S.C. § 1997(1) (1994) (emphasis added).

Thus, in the PLRA fee amendments Congress used the limiting phrase "a prisoner who is confined to any jail, prison, or other correctional facility," which it borrowed from the definitional section of the subchapter. Moreover, the distinction in the definitional section between juvenile facilities and "a jail, prison, or other correctional facility" is relied upon elsewhere in § 1997 to distinguish the legal protections of those confined in the two sets of institutions. Pursuant to § 1997(a), the Attorney General can initiate litigation to protect the statutory rights of persons confined in juvenile facilities, but not persons confined in facilities specified in § 1997(1)(B)(ii), *i.e.*, persons confined to a "jail, prison, or other correctional facility." Accordingly, the use of the phrase "jail, prison, or other correctional facility" in § 1997e(d) to restrict the scope of applicability of the fees amendment should be interpreted in conjunction with the definitional section of § 1997 to exclude juvenile facilities.

B. Section 1997 Should Not Be Construed to Create Surplusage

Moreover, if the court below is correct, the language "who is confined to any jail, prison, or other correctional facility" performs no function; the section would mean exactly the same thing with or without this language qualifying the reference to "prisoner." This Court has "consistently" expressed a "'deep reluctance to interpret a statutory provision so as to render superfluous other provisions in the same enactment.'" *Freytag v. Commissioner*, 501 U.S. 868, 877 (1991) (citation omitted); *see also International Union, United Auto., Aerospace & Agric. Implement Workers of Am. v. Johnson Controls, Inc.*, 499 U.S. 187, 201 (1991) (rejecting interpretation that would render surplusage

language restricting the scope of a statutory exception).

C. In PLRA Congress Distinguished § 1997 from Other Sections Amended by the Act

These are not the only compelling indicia of a Congressional intent to restrict the scope of coverage of the fees amendment through the reference to a "prisoner who is confined to any jail, prison, or other correctional facility." In other sections of PLRA,[13] but not in the amendments to this subchapter, a specific definition is provided making clear that the amendments do apply to juveniles. The PLRA amendments to 18 U.S.C.A. § 3626 (West Supp. 1997) specify the following:

> Definitions — *As used in this Section* —
>
> * * *
>
> (5) the term "prison" means any Federal, State, or local facility that incarcerates or detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law[.]

Id. § 3626(g)(5) (emphasis added).[14]

Accordingly, to adopt the Fourth Circuit's construction of § 1997, one not only has to discard as surplusage the restrictive clause

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[13] The PLRA amendments are codified in Titles 11 and 28, as well as Title 18 and Title 42. *See* 11 U.S.C.A. § 523(a) (West Supp. 1997); 28 U.S.C.A. § 1915 (West Supp. 1997); 28 U.S.C.A. § 1346 (West Supp. 1997); 28 U.S.C.A. § 1932 (West Supp. 1997).

[14] The portion of PLRA codified in 18 U.S.C. § 3626 provides limits on the scope and duration of injunctive relief in conditions of confinement cases.

in the fees amendments in § 1997e(d), but one must also construe part of the unamended definitional section in § 1997(1)(B)(iv) as surplusage, and utilize in § 1997 a definition from 18 U.S.C.A. § 3626 that Congress expressly limited to the latter section.

D. The Legislative History of PLRA Supports Distinguishing the Scope of Coverage of § 1997

The legislative history also supports petitioners' argument. In the original version of PLRA, the fees amendments were placed in 18 U.S.C.A. § 3626 and provided that no attorneys' fees under 42 U.S.C.A. § 1988 "may be granted to a plaintiff in a civil action with respect to prison conditions" except as provided by the section,[15] and the term "prison" was defined to include "any . . . facility that incarcerates or detains juveniles or adults accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law."[16]

A later version of the bill that became PLRA transferred the fees provisions from 18 U.S.C.A. § 3626 to 42 U.S.C.A. § 1997e(d). The provisions that remained in 18 U.S.C.A. § 3626 retained the express application to juvenile facilities. The definition of "prison" from § 3626, however, did not reappear in the provisions of PLRA amending § 1997. *Compare* H.R. 2076, 104th Cong., 1st Sess. § 802(g)(3), (5) (1995) *with* Pub. L. No. 104-134, § 803(d), 110 Stat. 1321, 1321-71 (1996) (codified at 42 U.S.C.A. § 1997e(d) (West Supp. 1997)). As in *Lindh*, a strong inference arises that Congress' use of different language and different definitions in the two sections was deliberate and reflects Congress' intent to treat juvenile facilities differently in the two sections.

The principal objection to construing § 1997e(d) as inapplicable to juvenile facilities is that the section defines "prisoner" to include any person "incarcerated or detained in any facility who is accused of, convicted of, sentenced for, or adjudicated delinquent for, violations of criminal law or the terms and conditions of parole, probation, pretrial release, or

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15 H.R. 667, 104th Cong., 1st Sess. § 301(f) (1995).

16 *Id.* at § 301(g).

diversionary program." § 1997e(h). This is the same definition of "prisoner" contained in 18 U.S.C.A. § 3626. The Fourth Circuit suggested that § 1997e(h) would not use this definition unless Congress meant the fees restrictions to apply to cases involving juvenile facilities.

This objection is not well-founded. Prior to the PLRA amendments, § 1997e dealt solely with administrative exhaustion requirements in prison cases. The relevant provision of § 1997 provided as follows:

> Subject to the provisions of paragraph (2), in any action brought pursuant to section 1983 of this title by an adult convicted of a crime confined in any jail, prison, or other correctional facility, the court shall [impose an administrative exhaustion requirement].

42 U.S.C. § 1997e(a)(1) (1994). PLRA amended this section to read as follows: "No action shall be brought with respect to prison conditions under section 1983 of this title, or any other Federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted." 42 U.S.C.A. § 1997e(a) (West Supp. 1997). Under the previous version of the section, a person under eighteen years of age convicted as an adult and confined in an adult facility would nonetheless not be subject to exhaustion of the administrative grievance system to which all other prisoners at the facility were subjected. By defining the term "prisoner" but not amending the definition of "prison," Congress subjected all juveniles held in adult facilities to the same exhaustion requirements as adult prisoners, but did not impose an exhaustion requirement on those juveniles held in juvenile facilities. While there is other language Congress could have chosen that would have worked as well, this is the language Congress chose to distinguish between juveniles in juvenile facilities, on the one hand, and adults and juveniles confined in correctional facilities, on the other hand.

The court below also reasoned that petitioners' construction of the statute creates surplusage. The definition in §

1997 of "prisoner" to include juveniles becomes surplusage unless there is some reason to distinguish between juveniles in adult facilities and juveniles in juvenile facilities. The court posited that there is no need to distinguish the two categories because "a juvenile who is simply 'accused of' a crime or even 'adjudicated delinquent' would not, under normal circumstances, be confined to an adult state facility." *Alexander S.*, 113 F.3d at 1385.

This factual premise, however, is simply incorrect. According to the Bureau of Justice Statistics, in 1994 only 76% of juveniles held in jails had been tried, or were scheduled to be tried, under the adult criminal code. *See* Bureau of Justice Statistics, U.S. Dep't of Justice, *Jails and Jail Inmates 1993-1994* 7 (1995).[17] The court below also cited 18 U.S.C.A. § 5039 (West Supp. 1997), which applies only to juveniles in federal custody, for the proposition that 18 U.S.C.A. § 5039 prohibits the placement of juveniles in adult federal facilities. *See Alexander S.*, 113 F.3d at 1385. In fact, the statute prohibits placement in adult facilities only if the juvenile would have "regular contact" with incarcerated adults. Similarly, while federal law mandates that states comply with certain restrictions to be eligible for federal grants to address juvenile delinquency problems, those federal restrictions also do not require the complete removal of juveniles processed in the juvenile justice system from adult jails and lock ups. *See* 42 U.S.C.A. § 5633(a)(14) (West Supp. 1995).

The only way Congress could cover all adult correctional facilities in all circumstances was to cover all juveniles, whether or not waived for criminal proceedings, held in adult facilities. While Congress intended to include juveniles in adult facilities within the scope of the fees amendment, it does not follow that Congress intended the fees amendment to apply to juveniles in separate juvenile facilities.

Accordingly, petitioners urge that the Court grant certiorari to review the Fourth Circuit's determination that § 1997e(d) applies to prevailing plaintiffs in cases involving conditions of confinement in juvenile facilities.

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[17] 1994 is the most recent year for which the Bureau of Justice Statistics has published data.

CONCLUSION

For the above reasons, petitioners request that the Court grant this petition for writ of certiorari to the Fourth Circuit Court of Appeals.

Respectfully submitted,

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October 24, 1997